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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 660,

Petitioner,

v.

EDWARD C. HESTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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I. STATEMENT OF THE CASE

Petitioner's statement of the questions presented for review does not comply with the requirement of Rule 21.1(a) that it not be argumentative. Petitioner disingenuously frames the question to include a hypothesis "if the putative plaintiff pursues an independent remedy created by the international union to review the local's action" begging the question whether an appeal under a union constitution from a fine is "independent," which at best can be fairly controverted. Since Rule 21.1(a) allows only the questions set forth in the petition or fairly included therein to be considered, and the only question alleged in the petition is so argumentative that it can not be presented for review as stated, the

petition is due to be denied.

The assertion (Pet. 1) that "Hester did not seek or obtain the consent of the Local before accepting that job" distorts the record. The Respondent is a crane operator, a veteran, and a member of the International Union of Operating Engineers (IUOE) and its Local 320, which were parties below. IUOE has a collective bargaining agreement with Tennessee Valley Authority (TVA) giving preference in the employment of equipment operators, to members of appropriate Locals of IUOE. This closed shop arrangement, implemented through Local hiring halls, would clearly violate 29 U.S.C.A. §§158(a)(3) and 158(b)(2) if those statutes applied to TVA. There is, however, one provision in the IUOE-TVA contract which overrides the closed shop preference in employment

to members of IUOE Locals within their "jurisdictions:" namely, a provision that veterans will have preference in employment over non-veterans, and disabled veterans over ordinary veterans. After having been displaced from a TVA job at Yellow Creek Power Plant by a disabled veteran, Hester asked TVA to place his name on the veterans preferential hiring list. He also sought to transfer his membership from Local 320 to the Petitioner, Local 660, which permission was denied by Petitioner as the IUOE Constitution allowed it to do arbitrarily, that is, without giving any reason. TVA then had a vacancy on a maintenance job at Brown's Ferry and, after ascertaining that Local 660's hiring hall had no veteran to refer, TVA hired Respondent. Respondent tendered "Travel Services

Dues" (App. 2a n.2) to the job steward, but he refused them upon instructions of Local 660's Business Agent Wisdom. Wisdom then asked Hester to quit, to give the job to a non-veteran member of Local 660. He did not quit and Petitioner commenced a disciplinary proceeding against him alleging generally that he had worked in its jurisdiction without its consent and violated unspecified Local rules. As provided in the subdivision of the IUOE Constitution relating to disciplinary matters, Hester appealed his $3,000 in fines imposed on November 10, 1983 to the IUOE General Executive Board. The IUOE informed Hester on December 9, 1983 that "payment of his fine is hereby waived pending. . . appeal." The IUOE Constitution prohibits members from bringing suits "unless all rights,

remedies and reasonable provisions for hearing, trial and appeal within the Organization shall have been. . . exhausted. . . . This provision shall only require resort to internal remedies for a period not exceeding four (4) months."

On August 6, 1984, the General Executive Board reduced the fines to $500 and affirmed them, adopting a report which read:

> "It is the position of Local Union No. 660 that Brother Hester, after being denied clearance by the Local Union, accepted employment with TVA in a job classification over which Local 660 has jurisdiction at a time when members of Local 660, qualified to accept the position, were out of work and available. . . .
>
> "Brother Hester's veteran's preference status would only have been relevant had he obtained clearance from the Local Union."

The first quoted sentence above

contradicts the statement in the Petition (Pet. 4) that "Hester did not seek. . . the consent of the Local before accepting that job." The last sentence amounts to saying that Local 660 can arbitrarily deny "clearance" to a person entitled to a TVA job under the collective bargaining contract to which it consented by its agent IUOE, and then enforce a closed shop and a closed union through intra-union discipline. On November 7, 1984 Respondent Hester commenced this action asserting claims under LMRDA §§101(a)(4) and 102, 29 U.S.C.A. §§411(a)(4) and 412; for breach of the duty of fair representation; and for improper discipline under pendent State law.

The district court granted summary judgment with respect to the federal claims on erroneous notions of subject

matter jurisdiction; it did not address any limitations questions (Pet.App. 54a-60a).

On appeal, a panel of the Eleventh Circuit reversed with respect to jurisdiction of the federal claims; the panel unanimously held that NLRA §10(b), 29 U.S.C.A. §160(b)'s six-month limitation applied to Hester's LMRDA claim; this followed a panel decision in Davis v. UAW, 765 F.2d 1510 (11th Cir. 1985), cert. denied, 474 U.S. 1057, decided after this action was commenced, but was contrary to established case law of the Fifth Circuit at the time it was commenced. Sewell v. International Association of Machinists, 445 F.2d 545 (5th Cir., 1971), cert. denied, 404 U.S. 1024 (1972), borrowing the Alabama one-year limitation to LMRDA claims arising in Alabama. It was also contrary to

decisional law of the Eleventh Circuit adopting as stare decisis prior decisions of the Fifth, which could not be overruled by a panel of the Eleventh, but only by the Eleventh en banc. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981). The panel overruled Sewell retroactively, saying that it "was compelled [to do so] by the intervening Supreme Court decision in Del Costello v. Teamsters, 462 U.S. 151 (1983)" (Pet.App. 13a, 11-17); in effect, holding that Del Costello had overruled Sewell. However, the majority of the panel further decided that the six-months statute did not begin running or was "tolled" by the pendency of Hester's intra-union appeal. (Petition App. 23a). It is this ruling that the Petition says "is fundamentally inconsistent with the decisions of this

Court, and of other courts of appeals, and contrary to the national labor policy." (Pet. 8).

REASONS FOR DENYING THE WRIT

The ruling complained of is not inconsistent with any decisions of this Court, nor of other courts of appeals, nor is it contrary to any national labor policy. Petitioner has failed to present any "special and important reasons" for the issuance of a writ of certiorari. Sup.Ct.Rule 17. Contrary to the petition, the ruling complained of does not present any issue warranting consideration by the Court.

There is, to be sure, a conflict among the Circuits post-Del Costello as to whether the §10(b) six-months limitation applies to suits under LMRDA §§101 and 102. Recently this Court granted certiorari in the case of Reed

v. Transportation Union, 828 F.2d 1066 (4th Cir. 1987), cert. granted, 56 LW 3601 (March 8, 1988), to resolve this conflict. But the resolution of that conflict cannot help petitioner's cause; on the contrary, if this Court should reverse Reed v. Transportation Union, supra, the question herein sought to be reviewed would be moot; for Hester's LMRDA claims would then clearly be commenced timely without recourse to tolling.

The substance of the Eleventh Circuit's holding is that the statute does not run on a LMRDA §101 claim, until the plaintiff knew or should have known of the union's final action or where the intra-union procedure "was exhausted or otherwise broke down to

[his] disadvantage (Pet.App. 17a).[1/] It based this result on the idea that if the Del Costello reasoning on limitations is borrowed,[2/] then for like reasons of policy the reasoning of that case and its progeny about when the statute runs must also be borrowed (Pet.App. 18a, n.23). Nothing in the law or the IUOE Constitution prohibited Hester from maintaining his intra-union

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1/ The court below at some points used language of tolling (Pet.App. 18a, n.23), and at others language of accrual or when the "section 10(b) limitations period begins to run." (Pet.App. 17a). It is of no great moment which terminology is used.

2/ The Eleventh Circuit refused to follow Sewell v. Machinists, 445 F.2d 545 (5th Cir. 1971), cert. denied, 404 U.S. 1024 (1922), and overruled its holding that the Alabama one year statute applied to an LMRDA §§101-102 claim arising in Alabama on the reasoning that this refusal "was compelled by the intervening Supreme Court decision in Del Costello." (Pet.App. 13a, n.17).

appeal beyond four months, although they did not require this. The IUOE had "waived" or stayed the fines pending resolution of the appeal (nor for just four months) (Pet.App. 31; Pet.5). Had the appeal never been decided, Hester's discipline remained hypothetical, speculative, and subject to a condition precedent; under the ripeness doctrine, his claim would have not presented "a real, substantial controversy" until the fines were affirmed. There is no decision of this Court or any Circuit in conflict with the Eleventh Circuit's resolution of this question. On the contrary, the only other Circuit which has considered precisely the same question decided it as the Eleventh Circuit did. Dunleavy v. Steelworkers, 814 F.2d 1087 (6th Cir., 1987). In fact, the Petition (Pet. 12) actually

admits that there is no actual conflict with any decision but at most an argument from analogy.

Granting the petition would necessarily involve additional questions such as whether the Eleventh Circuit should give retroactive effect to a six-months limitation period when it was clearly stare decisis in that Circuit when Hester filed this action, that a one-year state statute applied (Sewell v. Machinists, supra)[3/] and whether the

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3/ The statement by the Eleventh Circuit (Pet.App. 13a, n.17) that it was compelled by Del Costello to ignore the Sewell case conflicts with the assertions in the Petition (Pet. 16-17) that the Eleventh Circuit "based its decision principally upon a supposed analogy to hybrid §301/fair representation litigation. . . . That conclusion overlooks the fact that '[t]he contractual [grievance] procedures at issue in a hybrid lawsuit 'are significantly different from. . . internal union procedures'. . . ." Petitioner's attack on the Eleventh Circuit's reasoning as to tolling or time of accrual, if successful,

IUOE's staying of the fine raised a question of fact triable by jury as to equitable tolling or estoppel to plead the statute.

CONCLUSION

The Petition simply does not present any issue worthy of review at this time upon writ of certiorari.

Respectfully submitted,

C. V. Stelzenmuller

Footnote Continued

would necessarily contradict that Court's reasoning that Del Costello compels application of the §10(b) six-months statute to Hester's LMRDA claim and would moot the "Question Presented." The internal inconsistency in Petitioner's arguments is a reason for denying the writ, for this Court should not squander its limited resources absent a clear-cut case and controversy necessarily presenting an issue of general importance.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief in Opposition has been served upon Thomas N. Crawford, Jr., Esq., Cooper, Mitch, Crawford & Kuykendall, 409 North 21st Street, Birmingham, Alabama 35203, James T. Langford, Esq., Jacob and Langford, 1000 Rhodes-Haverty Building, 134 Peachtree Street, N.W., Atlanta, Georgia 30303, Donald R. Rhea, Esq., Rhea, Boyd & Rhea, 930 Forrest Avenue, Gadsden, Alabama 35901 and David Silberman, Esq., 815 16th Street, N.W., Washington, D.C. 20006 by placing same in the United States mail, postage pre-paid on this the 30th day of March, 1988.

OF COUNSEL